INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute and regulation involved	2
Statement	2
Argument	2
Conclusion	3
Appendix	9
	10

CITATIONS

Case:

Galban Lobo Company, S. A. v. *Henderson* (No. 2, decided September 30, 1942, certiorari denied, December 14, 1942, No. 498) 2

Statute:

Emergency Price Control Act of 1942, as amended (Pub. L. 421, 729, 77th Cong., 2d Sess.):

Section 2 ..... 6, 10

Section 203 ..... 3, 4, 6, 8, 11

Section 204 (a) 3, 5, 12

Section 204 (d) 3, 13

Section 206 14

Miscellaneous:

Procedural Regulation No. 1 (7 F. R. 971, February 13, 1942. Published as Title 32, Chapter XI, Part 1300, Sections 1300.01 to 1300.56, inclusive) 4, 8, 14

512795—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 676

MARK K. FRANK, PETITIONER

v.

LEON HENDERSON, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 52–53) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered December 29, 1942 (R. 54). The petition for a writ of certiorari was filed January 28, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act").

QUESTION PRESENTED

Whether petitioner's correspondence with the Office of Price Administration constitutes a protest, within the meaning of Section 203 (a) of the Act.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and Procedural Regulation No. 1, appear in the Appendix, *infra,* pp. 10–16.

STATEMENT

On February 11, 1942, Revised Price Schedule No. 46—Relaying Rail became effective pursuant to Section 206 of the Emergency Price Control Act of 1942. On October 21, 1942, the petitioner, a person subject to Revised Price Schedule No. 46, filed a complaint with the United States Emergency Court of Appeals praying that Revised Price Schedule No. 46 be set aside. In his complaint, petitioner referred to a telegram, dated September 12, 1941, from the Office of Price Administration to petitioner (R. 3) and five letters from petitioner to the Office of Price Administration (R. 3–39), as constituting his protest or protests. The petitioner's letters were dated, respectively, September 16, 1941, November 6, 1941, December 5, 1941, February 5, 1942, and April 1, 1942. The court dismissed the complaint, holding, in accordance with *Galban Lobo Company, S. A.* v. *Henderson* (No. 2,

decided September 30, 1942, certiorari denied December 14, 1942, No. 498), that of these documents, only petitioner's letter of April 1, 1942, could possibly constitute a protest against Revised Price Schedule No. 46, and that that letter failed to comply with the requirements of Section 203 (a) of the Act governing the content of a protest.

ARGUMENT

Section 204 (d) of the Act vests in the Emergency Court of Appeals (and in this Court upon review of judgments and orders of the Emergency Court of Appeals) exclusive jurisdiction to determine the validity of any price schedule "effective in accordance with the provisions of section 206." Pursuant to Section 204 (a) the jurisdiction of the Emergency Court of Appeals may be invoked only after the Administrator's denial, in whole or in part, of a protest filed in accordance with Section 203 (a). Accordingly the court below correctly dismissed the complaint if petitioner's representations to the Price Administrator did not constitute a protest under Section 203 (a). We submit that the court below correctly held that complainant had not filed a protest under the Act.

Section 203 (a) of the Act provides that within a period of sixty days after the effective date of a price schedule effective under Section 206, "any person subject to any provision of such * * * price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest

specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections".[1] The obvious purpose of requiring a protest to contain specific objections is to enable the Administrator intelligently to reconsider the challenged provisions.

Furthermore, the requirement that specific objections be stated in a protest is an integral part of the statutory pattern of protest and review of price regulations and schedules. Section 203 of the Act provides the administrative remedy which a person subject to a price schedule must exhaust before he may obtain judicial review of the validity of that schedule. But the requirement, that the possibility of relief through the protest procedure be exhausted before resort to the Emergency Court of Appeals, becomes meaningless unless protestants are required to give to the Administrator adequate notice of the respects in which the price schedule is challenged, as well as to present to the Administrator the evidence supporting such objections. Even if Section 203 (a) did not expressly require a pro-

[1] On February 12, 1942, immediately upon taking office, the Administrator issued Procedural Regulation No. 1, Rules 11, 12, 13, and 14 of which govern the filing, form, and content of protests. Rule 14 (c) required every protest to set forth "A clear and concise statement of all objections raised by the protestant against the provision or provisions protested, each such objection to be separately stated and numbered" (Rules 11, 12, 13, and 14 are set forth in the Appendix, *infra*, p. 14).

test to set forth specific objections, such a requirement would have to be implied from the provision of Section 204 (a) that "no objection to such * * * price schedule, and no evidence in support of any objections thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript."[2]

Tested by those requirements, it is clear that petitioner's letter of April 1, 1942, did not constitute a protest. As the Emergency Court of Appeals stated, the letter "appears to be an answer to inquiries directed to the complainant by the Office of Price Administration concerning the price at which complainant had consummated several business transactions" (R. 53). No specific objections to the schedule are stated in the letter. At most, and then only incidentally, it alleges generally that the Administrator in making Revised Price Schedule No. 46 effective under the Act, failed to comply with the standards set forth

[2] In the context of this statutory scheme for review of price schedules, there is no merit to petitioner's contention that his complaint was subject only to a motion for more definite statement, rather than to a motion to dismiss. Clearly, no particularization of objections in the Emergency Court of Appeals will satisfy the statutory requirement that the administrative remedy be exhausted by presenting specific objections and the supporting evidence in the protest proceeding, before review by the Emergency Court of Appeals can be sought.

in Section 2 of the Act to guide him in establishing maximum prices. But the standards of Section 2 are several: the maximum prices established by the Administrator must be such prices as will be generally fair and equitable and effectuate the purposes of the Act; and in establishing maximum prices the Administrator must, so far as practicable ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, and make adjustments for relevant factors which he may determine and deem to be of general applicability. Petitioner's letter of April 1, 1942, in no way specifies in what respects the Administrator has failed to comply with any of these standards. In the absence of articulate objections, the Administrator was unable to, and properly did not, consider petitioner's representations as a protest.

Moreover, in another respect the letter of April 1, 1942, fails to comply with the requirements for a protest. Pursuant to Section 203 (a), the Administrator has adopted Procedural Regulation No. 1, governing the filing, form, and content of protests. The reason for thus requiring protests to consist of a more or less formal statement is obvious. The Administrator receives thousands of letters containing suggestions and criticisms with respect to price schedules and regulations. Section 203 of the Act imposes specific obligations upon the Administrator when a protest is filed:

he must take action with respect to the protest within thirty days after the filing of the protest or ninety days after issuance of the regulation (in the case of a price schedule, within ninety days after the effective date thereof pursuant to Section 206) whichever occurs later; if the protest is to be denied, he must "inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice".[3] He cannot assume that every such letter is intended to initiate a formal protest proceeding leading to review by the Emergency Court of Appeals and by this Court. Accordingly, it is an administrative necessity that documents intended as protests should at least purport to comply with the requirements of the Procedural Regulation. The letter of April 1, 1942, did not conform in the slightest degree to the provisions of the Regulation. On its face, it did not purport to be an exercise of petitioner's statutory right to file a protest. In fact, the filing of the complaint in the Emergency Court of Appeals was the first intimation to the Administrator that petitioner considered his letter of April

[3] The volume of protests and correspondence received by the Administrator has necessitated the establishment of a formal system for docketing protests as such, for developing a formal factual record, and for disposing of protests within the statutory period.

1, 1942, to be a protest. Under these circumstances, the court below was clearly correct in holding that this letter did not satisfy the requirements for a protest under the statute and the Procedural Regulation.

Petitioner's complaint suggests that he regarded each of his letters as a separate protest. The court below so construed the complaint, and accordingly dismissed from consideration the letters written before the effective date of Revised Price Schedule No. 46. However, petitioner now contends that his letter of April 1, 1942, incorporated his prior correspondence and that, viewed as a whole, the entire series of letters, beginning on September 16, 1941, constituted a single "protest" to the price schedule. We submit that even if the earlier letters are considered along with the letter of April 1, 1942, as a single purported protest, the requirements of the Act and the Procedural Regulation are not met. As we have pointed out above, Section 203 (a) of the Act and the Procedural Regulation adopted thereunder are partly designed to relieve the Administrator of the unreasonable burden of spelling out from discursive correspondence possible objections to a price regulation or schedule. Nowhere in this correspondence are petitioner's objections set forth with sufficient specificity to advise the Administrator of the respects in which Revised Price Schedule No. 46 was challenged. Indeed,

even in his complaint in the Emergency Court of Appeals petitioner did not articulate any specific objections to the price schedule. Accordingly, even taken together, petitioner's letters did not constitute a protest under Section 203 (a) of the Act and the Procedural Regulation.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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